Supreme Court, U. S.
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IN THE

Supreme Court of the United States

NO. 79-2020

WILLIAM H. HAMMETT, JR.,

Petitioner

v.

ROCKWELL INTERNATIONAL CORPORATION
AND MGD GRAPHIC SYSTEMS,

Respondent

FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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OPINIONS BELOW

The following opinions and orders are appended to the petition.

(1) The March 25, 1980, opinion of the United States Court of Appeals for the Fifth Circuit;

(2) The June 21, 1979, order of the United States District Court, Northern District of Georgia, Atlanta Division, granting defendant's motion to dismiss;

(3) The February 17, 1976, Department of Labor administrative finding.

JURISDICTION

The judgment of the United States District Court, Northern District of Goergia, Atlanta Division, was entered against the petitioner on June 22, 1979. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court by its opinion and judgment of March 25, 1980. The jurisdiction of this court is invoked under 28 U.S.C. §1254 and Part V of the Rules of this court; and more specifically because the lower courts have rendered a decision on an important question of federal law which should be reviewed and settled by this court. Moreover, the lower court opinion incorrectly enlarges upon the existing precedent of this Court in denying the rights of those involuntarily retired pursuant to pension plan amendments after enactment of the Age Discrimination in Employment Act of 1967.

Finally, there is a conflict among the circuits on whether the administrative finding relative to discrimination is admissible.

QUESTIONS PRESENTED

I

Did the lower courts err by failing to consider whether the terminal layoff of the petitioner was age discrimination *vel non* in application; and by determining that failure to consider petitioner for rehire after involuntary retirement by a layoff was of "no significance whatever" and that the "average age of employees hired by Defendants since Plaintiff's termination is of little consequence"?

II

Should the court reject the Fifth Circuit rule permitting the admissibility of an administrative finding in favor of a more restrictive policy adopted by other circuits more appropriate to the facts of this case?

III

Was the willful amendment of a pension plan after enactment of the Age Discrimination in Employment Act of 1967 a subterfuge to lay off older employees without regard to ability; and under the circumstances of this case, in addition, discriminatory per se?

STATUTORY PROVISIONS

29 U.S.C. §623, Prohibition of Age Discrimination

(a) Employer practices. It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's

age; or

(3) to reduce the wage rate of any employee in order to comply with this Act (29 USCS §§621-634).

* * *

(f) Lawful practices--Age of occupational qualification--Other reasonable factors--Seniority system--Employee benefit plans--Discharge or discipline for good cause. It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance

plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause.

29 U.S.C. 623 (f)(2) as amended April 6, 1978, P. L. 95-256, §2(a), 92 Stat. 189.

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act (29 USCS §631(a)) because of the age of such individual; or

29 U.S.C. §621. Statement of findings and purposes

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from job;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimi-

nation in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 USCS §§621-634] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

STATEMENT OF THE CASE

William H. Hammett, Jr., was born on July 22, 1916 (Pretrial Order stipulation, par. 12(a); R. 123). He was employed by the Miehle Printing Press and Manufacturing Company and its corporate successors, except for military service during the Korean Conflict, continuously from January 1946 until August 31, 1975. In 1969, Miehle-Goss-Dexter, Inc., a corporate successor of Miehle Printing Press and Manufacturing Company, was acquired by North American Rockwell, the predecessor of Rockwell International Corporation (Rockwell). After the acquisition, the acquired corporation was renamed MGD, Inc. (MGD), and has remained a wholly-owned subsidiary of Rockwell. Rockwell, at the time of trial, had approximately 120,000 employees, and ranked 35th in corporate size. (Tr. 241-42). It has a sales force of several thousand. (Tr. 243).

Hammett spent his entire career selling sheet-fed printing equipment to the graphic arts industry. The sheet-fed equipment consisted of large presses domestically manufactured by the Miehle organization and for the last 25 years smaller Roland presses and accessory equipment manufactured in Germany and domestically distributed by Miehle. (Tr. 15-16). Hammett had experience selling all lines of Miehle and Roland presses, cutters, creasers, and bindery equipment. (Tr. 19-20, 65). He became known in the graphic arts industry early in his career as a "carton specialist" when the industry began relying heavily upon offset lithography in making folding cartons. (Tr. 18, 29-21). In such capacity he made frequent appearances before trade associations and professional peer groups explaining the technology and use of Miehle and Roland equipment (Tr. 23-24). Hammett became noted as an

authority in many phases of the graphic arts industry (Plaintiff's Exhibit 2; Tr. 24). In 1966, Hammett was promoted to Atlanta Sales Manager, and in 1969 to Atlantic Regional Manager. (Tr. 24-25). On January 7, 1971, on his 25th aniversary with the company, President Carl Carlson commended Hammett for his "dedicated and unselfish concentration on the job at hand". (Plaintiff's Exhibit 7). In 1974, he was retitled Atlanta District Manager, but continued to sell his Atlanta territory covering several states. (Tr. 27).

On or about March, 1975, Plaintiff was selected to serve in what became known as the "large press group" of the Miehle sales force, and placed under the direct responsibility of J. P. Cronin, Sales Vice-President. (Tr. 28-29). No members of the "large press group" were able to sell any presses from the formation of the group in March until it was

disbanded in July (Tr. 66, 85, 116). Several persons sought by Mr. Cronin for the large press group declined. Mr. Chapman, Eastern Regional Manager of the Miehle sales organization, age 46, declined as he thought the newly formed large press group was doomed to fail (Tr. 204); and he advised his Atlanta Regional Manager, Tom Williams, age 30, not to join the group. (Tr. 200). When the "large press group" was being established, Chapman questioned whether Miehle could continue to manufacture the large press (Tr. 204). Mr. Williams initially met with the new group in Chicago under the direction of Mr. J. P. Cronin but left the meeting and his assignment was terminated. After the declination of Chapman and refusal of Williams, Hammett was the only salesman assigned from the sales group under Chapman to the "large press group". (Tr. 199).

In June 1975, it was determined to

discontinue the domestically manufactured press for lack of sales. (Tr. 133). The large press group, to which Hammett had been assigned to specialize in the sale of the domestically manufactured Miehle large press was dissolved. On August 31, 1975, the Plaintiff was involuntarily retired by "terminal layoff" from his employment with MGD. (Plaintiff's Exhibit 10). Also casualties of the "large press group" in 1975 besides Hammett were Bob Soper, terminated on August 1, 1975, at age 63 (Tr. 92-93); George Bovin, product manager of the group, who was terminated at age 56; J. P. Cronin, sales executive of the group, who was requested to resign in January, 1976, at age 59; and P. Garrett who resigned at age 48. As for the remaining personnel, M. Thompson was on medical hold at the time of the layoff, age 53; and J. K. Martin, age 35, was re-absorbed into the Distributor Products or the "small press group". (Tr. 95, 161).

The average age of the persons selected for the large press group was 53.29 as opposed to the average age of the Miehle salesman in August 1975 of 41.6. (Plaintiff's Exhibit 23; Defendant's Exhibit 20). The average age of those in the large press group involuntarily terminated or asked to resign was 59.25. (Plaintiff's Exhibit 23). At the time of Hammett's retirement, he was fifty-nine years of age. He executed the Rockwell retirement application and added "signed only because of termination of my employment by employer at age 59, after 30 years of continuous employment." (Tr. 42; Plaintiff's Exhibit 2). The individuals remaining in employment continued to sell all the sheet fed printing equipment including a large Roland press which was imported from Germany to substitute for the domestically manufactured press. Hammett had previous experience selling the full line of

Roland products and was qualified by training and background to sell the large Roland imported press.

Hammett's sales territory was taken over by Tom Williams, then age 30, who had been assigned to the Atlanta office as Regional Manager and to whom the Plaintiff reported before being assigned to the large press group. Jerry Crowder, then age 32, was hired in November, 1976, to replace Tom Williams, who was then transferred to Chicago. (Tr. 212). Mr. Crowder had no previous experience with MGD in the sales of Miehle or Roland sheet-fed printing equipment or any related bindery equipment (Tr. 157) but had been previously employed by the Goss division of Rockwell handling another product line. (Tr. 32). In Cronin's opinion "from a technical and sales point of view, Hammett would be far above a person in the Goss Division because we do not have the same type of

customer," i.e., commercial printers and carton printers, printing advertising and books as opposed to newspapers (Tr. 97). Mr. Crowder was given the title of District Manager, same as previously held by Hammett. Eighteen employees have been added to the staff of sales persons since Hammett's involuntary retirement with one employee, Ed Hughes, being added as soon as January, 1976, which was after Hammett's layoff effective August 31, 1975, but before formal severance on May 13, 1976. The average age of the sales persons employed following Hammett's termination was 37.

As of the trial there were 24 sales representatives and managers assigned to the Commercial and Distributor Products Unit, as then called, and 28 were assigned on November 1, 1978. (Plaintiff's Exhibit 25; Tr. 153-155). Hammett was not reinstated or offered an opportunity for reinstatement since his involuntary

retirement. His Notice of Intent to File Suit was filed with the Department of Labor on February 23, 1976, and this action requesting reinstatement was filed on June 2, 1977, in federal district court. (R. 430). At the time of trial, a vacancy for a salesman existed in the Eastern Region in New York in June, 1978, which was filled by Mr. Woodall, age 44. Mr. Chapman further testified that a vacancy also existed at the time of trial in New York City (Tr. 211). Mr. Chapman, now 49 (Tr. 218), hired six sales persons in the Eastern Region since August 1975 (Tr. 212), their ages ranging from 32-56 (Tr. 212-214). Mr. Chapman became aware that Hammett sought reinstatement a year or a year and a half before trial upon reading a deposition (Tr. 217). Sales of the Miehle group increased beginning in 1976 and have been profitable since then according to Mr. Lemanski, Miehle Vice-

President. (Tr. 160, 127). Mr. Chapman, Eastern Regional Manager, testified that sales in the Roland line are excellent (Tr. 215).

J. P. Cronin was formerly employed by MGD as Vice-President, Contact Sales, Miehle Division, MGD. In such position he supervised Hammett. (Tr. 90-92). Mr. Cronin advised Hammett on or about July 25, 1975, that he would be terminated (Tr. 35), and neither he nor anyone else gave any option to Hammett, then or later, other than early retirement (Tr. 36, 56). The early retirement was not from any lack of competence or dissatisfaction with his performance. Mr. Cronin stated that Hammett "was and is a good salesman" (Tr. 89). According to company records, Hammett's job performance when terminated was stated to be satisfactory and he was stated to be eligible for rehire. (Plaintiff's Exhibit 10; Tr. 36). Hammett received a merit increase of

$500.00 on September 23, 1974, less than a year from the terminal layoff date of August 25, 1975, and a previous merit increase of $500.00 in 1973 (Tr. 28).

Sales executives currently with the company and with authority to reinstate Hammett gave no consideration to his being retained in the "Distributor Products" or imported press group or to his reinstatement (Tr. 148). Both Cronin and Lemanski expressed the opinion that Hammett was qualified to presently sell the line of sheet-fed presses and other equipment sold by MGD (Tr. 96, 102, 160). Experience with sales and with the equipment made Hammett more capable than others recently hired without sales experience and experience in the product line (Tr. 38).

Cronin was told by Mr. Lemanski to terminate Hammett and Mr. Soper, also a member of the large press group (Tr. 95). Soper was 63 at the time of his

layoff. His sales territory was taken over by Mr. John McManus who had been transferred to Minneapolis on May 1, 1975, from another Rockwell division, and was 44 when Soper was terminated. Mr. Soper's qualifications to sell the range of Miehle and Roland equipment far exceeded that of Mr. McManus who had no experience selling presses (Tr. 96). In March, 1974, Carl Carlson, President of the Miehle Division of MGD, told Cronin that Karl Hoenecke, President of MGD, wanted a younger man in Cronin's position as Vice-President sales (Tr. 98). In January, 1976, Ed Lemanski requested that Cronin take an early retirement at age 59, Cronin's date of birth being July 7, 1916. (Tr. 99; Plaintiff's Exhibit 17). Mr. McMillan, a younger man than Mr. Cronin, took his job. (Tr. 117).

At the time of its acquisition by Rockwell, MGD maintained an optional

profit-sharing plan for eligible salaried employees known as the Miehle-Goss-Dexter Salaried Employees' Profit Sharing Plan in which Hammett had elected to participate (Tr. 48). The plan provided, and had provided since at least 1958, that any participating employee had the right to elect to retire, or could be retired by his employer, after he had attained age sixty and had completed fifteen or more years of continuous employment with the company. (Tr. 48). The Miehle-Goss-Dexter Salaried Employees' Profit Sharing Plan remained in effect for participating employees until October 1973 when the Rockwell Retirement Income Plan for Certain Salaried Employees ("Rockwell Plan") was unilaterally extended to qualifying employees of MGD, including Hammett, and the Miehle-Goss-Dexter Plan was frozen in terms of contributions payable (Tr. 49). Under the terms of the Rockwell Plan, as

extended to MGD employees in 1973, any covered employee could elect to retire, or could be retired by his employer, at any time after attaining age fifty-five. (Plaintiff's Exhibit 15, section 4.2, paragraph 15; Tr. 50, 235). The provision authorizing the company to retire at age 55 was inserted into the 1968 restatement of the Rockwell Plan stated to be effective January 1, 1968 (Plaintiff's Exhibit 15, Section 4.2, paragraph 15; Tr. 226). Compare Plaintiff's Exhibit 24, Article 3, paragraph 3. The Rockwell Plan restatement was not finally promulgated until about 18 months after January 1, 1968 (Tr. 227). Before that, the predecessor plans in the form of insurance contracts with Equitable and John Hancock provided only that an employee may, with the company's consent, retire within ten years of normal retirement at age sixty-five. (Plaintiff's Exhibit 24). There was no provision for retirement prior to

age sixty-five at the sole option of the company in the predecessor insurance contract.

George Kennedy, pension consultant for Rockwell, testified that the failure to permit Hammett to defer retirement until age 60 "did not represent anything that the corporation believes in" and was "unhappy that MGD did not consult us." (Tr. 258). In Kennedy's opinion, Hammett should have had his retirement deferred until his 60th birthdate, thus becoming entitled to a retirement unreduced by a penalty factor of 1% for his life, and also being entitled to a company social security supplement of $250 per month until age 62. (Tr. 258-259; 257-258. See Plaintiff's Exhibit 13, line 30, "early retirement factor".) Hammett requested deferment of his involuntary retirement to age 60, a period of approximately seven weeks in order to obtain higher retirement benefits, but he was not

allowed to have retirement deferred until age 60. (Tr. 51). Therefore, Hammett was not eligible for and did not receive a social security supplement under the Rockwell Plan. (Tr. 57).

The "normal retirement age" as defined in both the MGD Plan and the Rockwell Plan is 65. (Plaintiff's Exhibits 14, 15, Tr. 44, 48). A computer printout titled "Report No. A730-450-020, Rockwell International Corporation Corporate Retiree System File Select Report" was elicited consisting of 42 pages and information concerning 1,558 retirees showing on its face the retirement age of Rockwell Employees between 1967 and 1977. (Plaintiff's Exhibit 16; Tr. 43). An analysis of the printout shows that of the total 1,558 retirees from 1967-1977 27% were retired early between ages 55-59; 47% were retired early at ages 60-64; and the remaining 26% were retired at the "normal retirement age" of 65.

(Plaintiff's Exhibit 17; Tr. 44-45). As shown by the computer printout, of 36 retirements in 1967, 24 retirements were at age 65, representing 67% of the retirements. (Plaintinff's Exhibit 18; Tr. 45). In the following years after implementation of the 55 compulsory retirement at the company's option, by insertion in the Rockwell Plan and made retroactive to January 1, 1968, early retirements became the rule rather than "normal retirement age" 65 retirements. In 1975, when Plaintiff was compulsorily retired, of 242 retiring only 48 or 17% reached 65. Of the remainder 95 or 33% were retired between ages 55-59, and 147 or 50% were retired at ages 60-64. (Plaintiff's Exhibit 19; Tr. 47).

The Rockwell Plan was restated to effect involuntary retirements prior to the normal retirement date after 1967 although the provision authorizing such early retirements at 55 was contrary to

the basic contracts of the Plan, and thus, according to Kennedy, implement its previous policy of company retirement before age 65 when indicated. (Tr. 246-247). The policy of enforcing an age 55 retirement in major economic dislocations such as the Corapolis plant closing in 1958 to retire all salaried employees age 55 and older (Tr. 225) was used by Rockwell prior to 1968 despite the language of the insurance contracts. (Tr. 253). Prior to the restatement of the Rockwell Plan, there was a master contract certificate issued by the insurance company, and individual certificates issued to each employee as a deferred annuity contract. (Tr. 246, 227). However, under the restated Rockwell Plan, the company was able to enforce a pre-65 retirement under any circumstances, and it was applied when the work force was "shrinking". (Tr. 253). According to Kennedy 80 or 90% of

the retirements effected before 65 were at the instance of the company. (Tr. 227). According to Kennedy, company attorneys drafted the restated Rockwell Plan in 1968-1969 including the provision reducing the compulsory retirement age at the company's option to 55 from 65.

A non-jury trial was held on March 20-21, 1979, and on June 22, 1979, the court issued an order dismissing the action on the merits (R. 523-536). Petitioner wishes to set the record straight that the finding made by the district court that he collected unemployment compensation is wrong. (par. 52). After enforced retirement and not knowing if he would obtain employment of any kind, he did apply for compensation, but never obtained any. There is no testimony in the record that he did, and he did not.

ARGUMENT

The Court of Appeals opinion was simply: "Affirmed". Therefore, any reference to the court by necessity is to the opinion of the district court. The decision is compounded with error, and the failure of the Court of Appeals to permit oral argument or write an opinion suggests that patent errors may be tolerated in the attempt of other age discrimination complainants to obtain relief. On one hand the decision jumps to the utlimate conclusion of business justification for the layoff without further analysis in the face of circumstances universally recognized to be reliable indicia of discrimination but here declared of no significance. On the other hand, the decision glosses over with superficial analysis a proven case of post 1967 changes in the Rockwell pension plan paving the way for involuntary retirement of persons who, like the

petitioner were not yet 60. This case underscores the need for supervision by the Supreme Court of the lower courts in an extremely important area of civil rights affecting all citizens--now or later. Shall long term faithful employees be condemmed subjectively by a superior at trial when the employer found the employee's work satisfactory and rated him "eligible for rehire"? Shall a business inspired layoff be a sufficient reason, per se, to terminate or involuntarily retire a long term employee under 70--or 59 as here? Is there not an obligation to lay off on a non-discriminatory basis as to age? Industry as well as employees deserve to know whether their responsibilities end at the edge of the layoff or whether they have some responsibility to rehire persons stated to be protected by the Age Act? The petitioner is a healthy industrious person with many productive years but has been consigned to sales jobs much less rewarding and challenging with smaller

organizations on account of his age and despite his efforts to upgrade employment. Not a union member, not a sales executive with a written contract, not a member of an organized advocate group, he hangs desparately upon the word and spirit of the Age Act. The agency charged with responsibilty for enforcing the Act made no review except to determine there had been a layoff, and their finding was used against him by the court. He seeks the review of this court even though the appeals process has summarily addressed his contentions thus far. His interest represents in general those of salaried persons who find themselves inextricably caught in the web of a layoff and bound by the iron will of an artificial person of immense resources.

I

The court erroneously concluded as a matter of law that Hammett's layoff and subsequent retirement was based on

economic considerations--not age. The court ascribed on legal weight to the fact that Hammett was given no consideration for another position or rehire or that the youngest employee of those "reorganized out of a job", Kent Martin, 32, was retained. The district court did not address this elementary factor in its determination. While a job abolition or reduction in force might suggest on the surface a neutral business condition, it must be examined in its application to determine whether it is discriminatorily applied. As stated in Moore v. Sears, 464 F. Supp. 357, 363 (N.D. Ga. 1979):

> [T]he assumption of job duties by younger employees may have positive significance. An employee whose position was technically abolished might be able to make a constructive showing of "replacement" if his duties were allocated exclusively, or principally, to younger employees. (footnote 6)

The district court concluded that Rockwell

presented a nondiscriminatory justification for the terminal layoff. However, that was apparently the court's final examination--no conclusion was made as to the application of the layoff as to protected older persons. Hammett showed by the evidence--both as to the alteration and application of the retirement plan and as to the method and manner of replacement that his layoff even if, arguendo, inspired by economic reasons, was discriminatorily applied against him on account of his age.

The court erroneously concluded as a matter of law that Hammett did not apply for and thus need not have been considered for a position after layoff and termination. Must a challenge to an enforced retirement be preceded by a new job application? Judicially requiring an application would be an extremely artificial impediment to the assertion of a statutory right. The hiring of 18 new employees, some rehires, all at

younger ages than Hammett is highly relevant evidence of a discriminatory use of a reduction in force to terminally lay off older employees. A finding that age was used as a determinative factor does not depend on direct evidence but may be inferred from a totality of the circumstances. Carpenter v. Continental Trailways, 446 F. Supp. 70 (E.D. Tenn. 1978). The court's statement that "the fact that Plaintiff was not rehired is of no significance whatever in evaluating Plaintiff's claim..." is erroneous as a matter of law.

In stating that the "average age of employees hired by Defendants since Plaintiff's termination is of little consequence" the court erred as a matter of law. The evidence was undisputed that after his separation Hammett was replaced in Atlanta in the same job position by Jerry Crowder, who had been rehired at age 32 in November, 1976,

with no experience in the product line of MGD (Tr. 212, 157). Younger employees were hired after Hammett's termination who possessed less experience and were less capable in the direct sales of sheet fed presses than him. It was a discriminatory application of the Rockwell Retirement Plan to terminate Hammett purportedly due to a reduction in force and then to retire him pursuant to the retirement plan. Other younger persons were given new employment with MGD not long after Hammett's "terminal lay-off" on August 31, 1976, and some were employed while Hammett was still receiving severance benefits. Hammett did not begin receiving his retirement benefits until June 1, 1976. Six employees were hired by MGD beginning on January 19, 1976, for the work that Hammett was trained to perform and did perform creditably over a lengthy period of time. Their ages at time of hire were as follows: Bence, 31; Bock,

40; Condic, 26; Hughes, 34; Nilsen, 41; and Webb, 39. The Defendants re-employed Jerry Crowder, age 32, on November 1, 1976, and he was given the same position and duties held by Hammett. Again the court refused to go beyond a facial finding that the layoff and retirement were based upon economic considerations without regard to whether there was a discriminatory application of the terminal layoff, and thus erred as a matter of law.

The district court concluded that Hammett could have been "terminated" even if the [compulsory] early retirement date for MGD employees [in 1973 and for Rockwell plan participants in 1968-1969] had not been changed. The statement is an apparent truism but legally simplistic. The fact remains that he was retired pursuant to the retirement plan. Further, if Hammett had not been retired but

discharged, under the ADEA he still would have proven a discriminatory use of a reduction in force to discharge him and others as a result of age and replace him and others with younger employees. Examine the thesis that Hammett was favored by retirement in that he could have been discharged. It is not the employee who benefits but the company in violation of the ADEA if older employees succumb to early retirement pressure during "shrinkage" conditions and thus execute a retirement application to continue eligibility for life insurance and health insurance (Tr. 225-226), both valuable attributes to older persons. The company then escapes the claim under the ADEA that age was a determinative factor in determining those selected for lay-off. The employee, often less forceful and insistent than the petitioner is faced with a Hobson's choice, i.e.,

whether to accept early retirement or termination. See Mitchell v. DeMario Jewelry, 361 U.S. 288, 293, where Mr. Justice Harlan stated in a Fair Labor Standards Act case involving retaliatory employer conduct:

> Resort to statutory remedies might thus often take on the character of a calculated risk, with restitution of partial deficiencies in wages due for past work perhaps obtainable only at the cost of irremediable entire loss of pay for an unpredictable period. Faced with such alternatives, employees understandably might decide that matters had best be left as they are. We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice.

Likewise, in the present case, Rockwell should not be able to avoid the penalty for arbitrarily using the retirement plan to effect a "terminal layoff" of petitioner and other older persons on the artifice that it was giving Hammett a benefit by retiring him in lieu of discharge. As stated by Rockwell's pension consultant, Mr. Kennedy, use of

a compulsory retirement age "eliminates the necessity of selection". (Tr. 228). Furthermore, the shabby attempt of Rockwell to low-rate such a loyal and valuable employee as petitioner by the highly subjective testimony of Mr. Chapman should have been rejected by the district court as a belated post hoc attempt to justify his lay-off for reasons not pertinent at the time of the enforced retirement. See Buchholz v. Symons Mfg. Co., 445 F. Supp. 706, 711 (E.D. Wisc. 1978). As stated in Hannan v. Chrysler Motors Corp., 443 F. Supp. 802 (E.D. Mich. 1978), there was not a "whisper that she was incompetent." (p. 803). As in Hannan, Rockwell's own employment records showed that Hammett performed satisfactorily, and even stated that he was "eligible for rehire". Any suggestion or finding to the contrary by the district court was not supported

by the evidence. Instead of laying off Hammett for a period until business renewed, as it did beginning the following summer when new employees began to be hired, he was given a "terminal lay-off". Compare Hannan v. Chrysler Motors Corp., supra.

Testimony at trial revealed an undisguised policy of favoring younger employees being implemented by MGD, Hammett's employer. Mr. Cronin testified that he was advised in March, 1974, by his Miehle division President that the MGD President wanted a younger man in Cronin's position. (Tr. 98). He was not cross-examined on this point. Mr. Cronin was requested to implement the terminal layoff of Hammett in July, 1975. In January, 1976, Cronin in turn was asked to take an early retirement by his MGD superior, Mr. Lemanski, who did not seek to deny that he requested the

early retirement in his testimony. This testimony is other evidence of the arbitrary use of age to effect personnel decisions at MGD. Most courts have held parent corporations such as Rockwell responsible for discriminatory practices of subsidiaries. See case collected in Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181, 1183 (E.D. N.Y. 1979). As stated in Schulz vs. Hickok Mfg. Co., 358 F. Supp. 1208, 1212 (N.D. Ga. 1973):

> While it is true that the only question in this action is whether defendant discriminated on the basis of age in its discharge of one particular employee... evidence of the defendant's behavior in similar cases is decidedly relevant to the court's determination of the reasons behind plaintiff's discharge.

Therefore, the court should review whether the lower court erred by failing to pierce the layoff for non-discriminatory application and whether the lower court erroneously failed to consider rehires as relevant to the question of discrimination.

II

The court erroneously concluded that the investigative conclusion of the Department of Labor is entitled to weight. The lower court was entitled to give deference to this finding under Smith v. Universal Services, Inc., 454 F. 2d 154, 157 (5th Cir. 1972); See also Garcia v. Gloor, 609 F. 2d 156, 165 (5th Cir. 1980). However, the facts of this case point out the extreme illogic of such authority, and the legitimate concern of the dissenting judges in Universal Services, Inc. (id at 160). The determination of the Wage and Hour Division of the Department of Labor is solely supported by Defendant's Exhibit 5. The February 17, 1976, letter advised Hammett that his complaint was forwarded to another office and its receipt was acknowledged December 2, 1975. "Upon examination of available data", it was concluded that age was not a factor in Hammett's termination by a division of

"International Rockwell". The Department of Labor did not examine enough data to ascertain the name of the corporate parent, and it is thus unlikely that the Wage and Hour Division ever examined the Rockwell pension plan. The Wage and Hour Division could not have had the data concerning those newly employed, and it was not until Rockwell's pension consultant Kennedy recanted prior statements in his third pretrial affidavit of August 16, 1978, was it evident that the Rockwell Plan 1968-1969 "restatement" containing a compulsory retirement age of 55 at the option of the company was not previously a feature of the pension plan. Nor did the Wage and Hour Division have available the Rockwell computer printout processed on April 18, 1978 (Plaintiff's Exhibit 16), from which the conclusions are drawn as shown in Plaintiff's Exhibits 17-19 to the effect that a

"normal retirement age" of 65 became the exception rather than the rule after the 1968-1969 Rockwell Plan restatement.

The preferred rule, and one that is demanded of justice in this case is the majority rule implemented in other circuits who have divided with the Fifth Circuit and denied admissibility of the administrative finding. See Walton v. Eaton Corp, 563 F. 2d 66 (3rd Cir. 1977) and cases cited. The Supreme Court should institute a rule providing a uniform practice, and the prejudicial liberality of the Fifth Circuit rule should be rejected. In this case, the admissibility of the administrative finding was squarely accepted, and it was given weight adversely to the contentions and proof of the petitioner. In short, by the lower court giving weight to the conclusion of the Department of Labor as indicated in its order, that alone invalidates as a matter of law the district court's determination.

III

The court erred as a matter of law by concluding that the Rockwell Retirement Plan was not adopted as a subterfuge and Hammett's retirement pursuant to the plan is exempted from the ADEA. The district court made this conclusion apparently issuing a finding of fact in support as stated below:

> The preponderance of the evidence suggests that the concept of early retirement developed at the insistence of employees rather than management, and that most early retirements are voluntary, rather than involuntary.

This findings is inapplicable to the contentions raised by the petitioner that he, as opposed to what may have befallen others, was the victim of a illegal involuntary retirement. That the concept of early retirement might have been first advanced by employees or labor unions has no relation to Hammett's rights under the ADEA and his contentions with respect to the knowledgeable insertion

of an earlier retirement age in the Rockwell Plan in violation of the insurance contract and the ADEA, the application of the restated plan to effect earlier retirements, the use of a reduction in force, even if for economic reasons, to lay off older employees, et cetera. Use of the pension plan to accomplish earlier retirements in a shrinking work force, the policy said to have been utilized by Rockwell in implementing the 1968-1969 "restated" plan, is an illicit application of the plan in violation of the ADEA in general and outside the exception of Section 623(f)(2). In essence, the policy as stated by pension administrator Kennedy was "indiscriminately" applied to encourage, before the plan's restatement, and to enforce, after restatement, by virtue of compulsory language early retirements in a shrinking work force. This application of the plan after the restatement is completely illicit under

the ADEA. That 80-90% of the older employees, or 99% for that matter, "voluntarily" retired under this "stacked deck" is beside the point. Under the ADEA, if only one employee, William H. Hammett, Jr., resists early retirement, he is entitled to the statute's protection whatever the desires of his co-workers. However, the record shows that others were forced into retirement, e.g., Cronin, and were replaced by younger employees, e.g. Soper by McManus. Pension consultant Kennedy testified that 80-90% of early retirees wanted to be retired. He refused to be specific about the remainder. The district court was impressed by Kennedy's statement that MGD wanted a retirement age consistent with Rockwell (55, at the company's option). It was not established which employees and for what purpose they desired a compusory retirement age of 55 inasmuch as they could already retire

with the company's permission at 60. (Plaintiff's Exhibit 14, page 6). MGD could have adopted the permissive retirement at 55 as set out in the original Rockwell Plan Article 3, paragraphs I and II (Plaintiff's Exhibit 24) without adopting the compulsory aspect. Moreover, in the agenda for the meeting on July 11, 1973, to consider extension of the Rockwell Plan to MGD employees it appeared that it was assumed that "in every case" that the "Pittsburgh" or Rockwell plan would provide greater benefits to MGD employees. (Defendant's Exhibit 26). This conclusion, however, is not supported by Hewitt Associates' report, which clearly states that a "retirement age of 65 has been assumed throughout the report in determining and comparing benefits. (Defendant's Exhibit 24, p. ii). There is no comparative study of the plan with respect to an early retirement. Thus, the study is of doubtful validity

in comparing retirement benefits between the MGD and "Pittsburgh" or Rockwell plan. The irrefutable point is that the conversion to the Rockwell plan made it possible to compulsorily retire Hammett at age 59. The loss of benefits as opposed to even an age 60 retirement is apparent from the testimony of Kennedy and an examination of Defendant's Exhibit 24, page ii. He had a penalty factor of 1% applied to his retirement earnings and lost eligibility for $250 monthly social security supplements from age 60-62. If he could have remained until "normal retirement age" his retirement income would have been greatly increased. The lower court's determination that MGD, a subsidiary corporation, requested the rollback to age 55, hardly evidences good faith in the face of lost benefits for its employees.

The pension plan exception to the ADEA as enacted covers only bona fide employee benefit plans not used as a subterfuge to defeat the purpose of the ADEA. Though perhaps bona fide and not a subterfuge in inception in 1941 or in 1948 when adopted by Rockwell after merger, it was modified in 1968-1969 by reducing the compulsory retirement age at the option of the company even in face of the ADEA enacted in 1967. As an exception to the general provision of the Act, the pension plan exception must be narrowly construed, and there is a requirement on Rockwell to establish that the exception plainly and unmistakably falls within the terms and spirit of the legislation. See Phillips Company v. Walling, 324 U.S. 490 (1945); Brennan v. Taft Broadcasting Company, 500 F. 2d 212, 220 (dissent). Compare Aaron v. Davis, 424 F. Supp. 1238, 1242 (E.D. Ark. 1976) where the Court refused to apply the employee

benefit plan exception. In Aaron, the Court stated:

> The City of Little Rock cannot turn the State of Arkansas's voluntary retirement plan into an employee benefit plan within the meaning of 29 U.S.C. §623 (f)(2) by merely passing a city ordinance requiring firemen to retire at age 62.

Likewise, Rockwell has attempted to convert an existent pension plan granting to the employee an optional retirement between ages 55-65 into a plan with transparent advantages to the corporation in reducing the number of older employees and yet maintain the cloak of legality for the purposes of the §623(f)(2) exception. Properly viewed, Rockwell's switching of compulsory retirement ages in violation of the basic insurance contracts, both the master contract and individual employee contract, is itself a subterfuge and willful violation of the Act deserving the condemnation of this Court and entitling Hammett to relief. It is establ-

ished by the testimony of Rockwell's pension consultant, Mr. George Kennedy, that effective January 1, 1968, after passage of the Age Discrimination in Employment Act, the age at which an employee could be required to retire at the option of the company was dropped from 65 to 55. Thus, in the context of United Air Lines v. McMann, 434 U.S. 192 (1977), it is evidence of bad faith that the provision of the Rockwell retirement plan was promulgated after passage of the Act. The timing, circumstances, and stated purpose of the provision reducing the age from 65 to 55 in which an employee could be involuntarily retired requires a determination that the retirement plan is a subterfuge. Moreover, in application of the amended retirement plan, it is apparent that the stated normal retirement age of 65 was the exception rather than the rule. The Rockwell Plan is not bona fide in the

sense that the "normal retirement age" as stated therein is indicated to be the exception rather than the rule by Rockwell's records. As shown by the computer print out giving information concerning retirement ages of Rockwell employees (Plaintiff's Exhibit 16), most retirements have taken place prior to age 65. In 1975, when Plaintiff was compulsorily retired, of 34 retiring only 4 reached age 65. Beginning shortly after the insertion of the 55 compulsory retirement at the option of the company or employer in the 1978-1969 "restated" Rockwell Plan, a significantly increased number of employees were retired below the "normal retirement age". Furthermore, the retirement plan to which the Plaintiff was converted on October 1, 1973, was in its application to him discriminatory inasmuch as the MGD Retirement Plan in which he had originally enrolled did not permit a retirement at the option of the employer

until age 60. (The Plaintiff was discharged at age 59). Rockwell did far more than observe the terms of its retirement plan in its actions. The district court in Hannan v. Chrysler Motors Corporation, 443 F. Supp. 802 (E.D. Mich. 1978) construed "observe" as used in the statute:

> Chrysler's argument is supported by Brennan v. Taft Broadcasting Company, 500 F. 2d 212 (5th Cir. 1974), where the court held that a bona fide plan which permitted involuntary retirement at the option of the employer was exempt from the ADEA; and Zinger v. Blanchette, 549 F. 2d 901, 905 (3rd Cir. 1977), where the court held that a forced early retirement under a bona fide retirement plan did not violate the ADEA and further found a distinction between retirement and discharge, holding that a bona fide retirement plan was not something Congress intended to regulate when it enacted the ADEA.
>
> In our view, however, these cases are not persuasive on the facts presented here. Chrysler did more than passively observe the terms of its retirement plan in placing this plaintiff on involuntary

> retirement. The word "observe" denotes a type of passive acquiescence that simply is not present when an employer has an arbitrary and unlimited option to place an employee on involuntary retirement to serve its immediate goals. We cannot assume that Congress chose the word "observe" without reflection. As Circuit Judge Tuttle pointed out in his persuasive dissent in Brennan v. Taft Broadcasting Company, supra, the statute does not state that it is not unlawful for the employer to "enforce" or to "carry out" the terms of the retirement plan. Chrysler went far beyond observing the terms of its retirement plan. See McMann v. United Air Lines, 542 F. 2d 217, 219, note 2 (4th Cir. 1976) (dictum), rev'd on other grounds, ____ U.S. _____, 98 S. Ct. 444, 54 L. Ed. 2d. 402 (1977). Chrysler did not demonstrate that it passively observed the provision of its retirement plan at all times and applied it routinely to all employees, the circumstances presented to the Supreme Court in McMann. Therefore the defendant cannot avail itself of the exemption of §623 (f)(2).

Therefore it is seen that in Hannan the court distinguished between the establishment of a bona fide plan and the application of a plan. The court further stated:

> Merely because we have found Chrysler's retirement plan a bona fide plan and not a subterfuge to evade the purposes of the Act when it was adopted in 1950 does not mean that Chrysler can never utilize the provisions of that plan in a discriminatory manner proscribed by the Act, once the exemption is inapplicable.

In Davis v. Boy Scouts of America, 457 F. Supp. 665 (D.N.J. 1978), 18 EPD§8662, the court construed the 1978 amendment of Section 623(f)(2).

> ...no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified ... because of the age of such individual;....

to repeal the interpretation of McMann, supra, thus comporting with the original intent of Congress. Therefore, the lower court would be bound by the change in law and must apply it to Hammett as well as prospectively. Bradley v. School Board, 416 U.S. 696, 711, sets forth the principle as the anchor of its holding, originating in a decision of Mr. Chief Justice Marshall,

that:

> a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest unjustice or there is statutory direction or legislative history to the contrary.

Civil rights for 59 year old salaried persons laid off and involuntarily retired is a matter of great national concern, as would be indicated not only by the legislative history and enactment of the ADEA (See §621, supra) but also by the enactment of the 1978 amendment to the ADEA prior to the trial of this case. The amendment barring a benefit plan from requiring or permitting an involuntary retirement because of age was intended to clarify that the original congressional purpose of §623(f)(2) was to facilitate the hiring of older employees by not requiring equal benefits under benefit plans.

However, there is no conflict between McMann and the petitioner, but rather a harmony. McMann forcefully stands on its "flip side" for the proposition

that where a pension plan has been changed after enactment of the ADEA that the employer must show the amendment was not a subterfuge to avoid the ADEA. Under the pension amendment in this case rolling back mandatory retirement to age 55 after the ADEA in contravention of the basic insurance plan to which petitioner was beneficiary, for the purpose of providing on a non-competitive or "non-selective" basis older employees (age 55-65) for retirement whether voluntary or unvoluntary; when the plan, against statistical experience, retains a "normal" retirement age of 65, and when the amendment was drafted upon advice and by counsel knowledgeable of the ADEA, and the amendment itself was belatedly acknowledged by Rockwell's pension consultant in his third affidavit in support of motion for summary judgment, there is no basis to designate this plan, as amended, as less than a subterfuge. Thus, within the strictures of McMann,

the Rockwell Plan, as it exists and as applied to the petitioner is a sham so far as the letter and spirit of the ADEA. No business justification would be relevant to alter the conclusion that the facts present a plan amendment which is not bona fide and a subterfuge. Even so, the lower court found a business justification only in the layoff--not in the pension plan amendment, which was not even addressed. The lower court decision and the affirmance, hold that a layoff--once justified pretermit consideration of age discrimination complaints. Unfortunately, McMann is being applied in this fashion by virtue of its limited holding. This court can remedy not only this lower court error but prevent future restrictive and unwarranted denials of the protection intended to be afforded by the ADEA. Rockwell and MGD acted without authority in enforcing a retirement upon Hammett pursuant to the pension plan. The

Rockwell pension plan was significantly modified by the 1968-1969 restatement drafted in violation of the master insurance contract. Thus, not only was the contract modified after passage of the ADEA in violation of the ADEA but also in violation of the prior agreements between the insurance company, Rockwell, and Hammett as a subsequent beneficiary. In Davis vs. Griffin-Spalding County, Georgia, Board of Education, 445 F. Supp. 1048 (N.D. Ga. 1975), the district court by pendent jurisdiction determined that a local school board had exceeded its authority by compulsorily retiring a teacher at age 65. By the same theory, as adduced by evidence at trial, Rockwell breached Hammett's contract with the annuity contract insurance carrier by reducing compulsory retirement, at the company's option, from 65 to 55 in a restatement of the Rockwell Plan converting the pension to a deferred annuity plan

effective January 1, 1978. The effect of the breach was to seriously damage Hammett by permitting his enforced retirement at age 59. However, this court need not consider pendent jurisdiction as the same flagrant contractual breaches by Rockwell constitute evidence of subterfuge in the application of its pension plan to subject employees to enforced retirement at earlier ages, and the restatement was not only a subterfuge to avoid the Act but per se discriminatory and violative of the Age Act independent of Section 623(f)(2).

In the McMann case, the Plaintiff was a participant in a plan established in 1941 and which the employee voluntarily joined in 1964. The Plan stated that normal retirement was at age 60, and McMann was compulsorily retired at 60. In the case of Hammett, he was enrolled in the MGD Plan under which there was no provision for retirement at the option of either the employee or the employer

until age 60, (Plaintiff's Exhibit 14, Section 5.1, p. 23). However, he was retired at age 59 after being unilaterally converted without his consent on October 1, 1973, to the Rockwell Plan when the MGD Plan was frozen as to future contributions. By these facts, McMann is distinguished in several ways:

(1) The plan in which Hammett was originally enrolled, known as the MGD Plan, and the Rockwell Plan, to which the Plaintiff was converted, both indicate that the normal retirement age was 65--not 60 as in the United Air Lines Plan;

(2) Hammett was retired before the normal retirement age of 65 as stated in both plans--he was compulsorily retired at 59;

(3) Hammett did not voluntarily enter the Rockwell Plan to which he was unilaterally converted--McMann voluntarily entered the United Air Lines Plan;

(4) Hammett was converted to the Rockwell Plan on October 1, 1973, well after enactment of the Age Act--McMann's rights under his plan did not change after he joined in 1964 (the new provision of the Rockwell Plan authorizing a compulsory retirement at age 55 was applied to the Plaintiff although it had not been a feature of the MGD Plan);

(5) The change in the Rockwell Plan instituting effective in 1968 a compulsory 55 retirement at the option of either the company or an employee has already been discussed;

(6) Finally, the application of the plan as indicated by the computer printout (Plaintiff's Exhibit 16) indicates that the stated age 65 normal retirement was the exception rather than the rule and that early retirements became increasingly frequent after the 1968-1969 restatement.

The following language from Mistretta

v. Sandia Corp., 18 EPD 5527, 5529 (D. N.M. 1978) is applicable to Rockwell's use of the pension plan 1968-1969 restatement to arbitrarily retire Plaintiff:

> Sandia Laboratories is replete with intelligent professional personnel. In addition it has house counsel. Sandia knew that its conduct was subject to the ADEA and was well-equipped to see that its layoff decisions and policies, well laid out as they were, complied with the law. On the basis of the evidence presented I find and conclude that Sandia did not comply with the law, that in spite of statistical implications that a violation of the ADEA was imminent, Sandia disregarded the law. The defendant's actions, although neither malicious nor in bad faith, were purposeful, designed and intentional. For purposes of the ADEA, "To be willful, the violation must be shown to be deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accident or by ordinary negligence." Dowd v. Blackstone Cleaners, Inc., 306 F. Supp. 1276, 1281 (D.C.N.D. Tex. 1969). (other citations omitted.)

The Sandia language is even more pertinent in view of the Rockwell Plan restatement having been drafted in its entirety by its attorneys after adoption

of the ADEA (Tr. 260). Mr. Kennedy was aware of the passage of the ADEA, and his office supplied the governing insurance contracts to the attorneys for their use in drawing up the restatement (Tr. 260).

The lower court in effect adopted the view of a subterfuge espoused by the Third Circuit in Zinger v. Blanchette, 549 F. 2d 901 (3rd Cir. 1977). That court held, as the court in this case, that in effect an involuntary retirement is not actionable regardless of any subsequent modification where a retirement plan is "bona fide" in the sense it pays substantial benefits. However, the McMann decision did not adopt the rationale of Zinger, but chose the reasoning of Brennan v. Taft Broadcasting Co., 500 F. 2d 212 (5th C r. 1974) that there was no subterfuge when the plan preceded the enactment of the statute(no amendment being in issue). Therefore, the lower court erred by following the Zinger rationale in preference to the

limited holding of McMann despite the stated reliance on McMann. See Marshall v. Eastern Airlines, Inc., 474 F. Supp. 364 (S.D. Fla. 1979) where this analysis of McMann, Zinger, and Taft is relied upon to find a subterfuge in the reduction of retirement age by a plan amended after passage of the ADEA. The Zinger rationale, if permitted to survive, will result in insulating involuntary retirements, as opposed to discharge, from the protection of the ADEA. Further, it says that while the corporation was caught in a subterfuge, it did not have to engage in a subterfuge to accomplish the objective of ridding the corporation of older persons. Therefore, why should it be liable to the petitioner? We appeal for a review and correction of this error and unjustice important to the petitioner and those who may seek to attentuate a major civil rights statute if not now resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Certiorari was served on counsel for the Respondent by mailing same in an envelope addressed to the following:

Mr. William A. Clineburg, Jr.
King & Spalding
2500 Trust Company Tower
Atlanta, Georgia 30303

This _____ day of June, 1980.

Beverly B. Bates
BATES, BAUM AND LANDEY

Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-2897
Summary Calendar*

WILLIAM H. HAMMETT, JR.
Plaintiff-Appellant,

v.

ROCKWELL INTERNATIONAL CORPORATION and MGD GRAPHIC SYSTEMS,
Defendant-Appellees.

Appeal from the United States District Court

For the Northern District of Georgia

(MARCH 25, 1980)

Before BROWN, TJOFLAT and FRANK M. JOHNSON, Jr., Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.1/

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*Fed. R. App. P. 34(a); 5th Cir. R. 18.

1/See N.L.R.B. v. Amalgmated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM H. HAMMETT, JR.

C-77-921A

V.

ROCKWELL INTERNATIONAL
CORPORATION and MGD
GRAPHIC SYSTEMS, INC.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

FINDINGS OF FACT

1. Plaintiff William H. Hammett, Jr., has brought this suit under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §621 et seq., and the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §201 et seq., for damages and other relief arising out of the alleged age discrimination against the plaintiff by the defendants.

2. The plaintiff was born on July 22, 1916.

3. The plaintiff was employed by the Miehle Printing Press and Manufacturing Company, or corporate successors thereof,

except for military service during the Korean Conflict continuously from January 1946 until August 31, 1975.

4. In 1969, Miehle-Goss-Dexter, Inc., a corporate successor of Miehle Printing Press and Manufacturing Company, was acquired by North American Rockwell, the predecessor of Rockwell International Corporation ("Rockwell").

5. After the acquisition, the acquired corporation was renamed MGD, Inc. ("MGD").

6. MGD has, at all times since 1969, remained a wholly-owned subsidiary of Rockwell.

7. The plaintiff spent his entire career selling sheet-fed printing equipment to the graphic arts industry.

8. The sheet-fed equipment consisted of large presses domestically manufactured by the Miehle organization as well as for the last 25 years smaller Roland presses and accessory equipment manufactured in Germany and domestically distributed by Miehle.

9. Plaintiff had experience selling all lines of Miehle and Roland presses, cutters, creasers, and bindery equipment.

10. At all times relevant hereto, plaintiff was employed in the Miehle Division of MGD, Inc., the division which manufactured, marketed, and distributed sheet-fed printing presses and related cutting, creasing, and binding equipment.

11. During the late 1950's and early 1960's, plaintiff served as a "folding carton specialist" in Miehle's New York offices. In the capacity, plaintiff was involved in the sale of large 60-inch sheet-fed presses manufactured by Miehle as well as smaller presses which were manufactured in Germany by Roland and marketed in the United States by Miehle.

12. Plaintiff became highly skilled and knowledgeable regarding the design and use of the Miehle and Roland presses.

13. He made at least two appearances before trade associations and professional

peer groups explaining the technology and use of Miehle- and Roland-type equipment.

14. In 1966, plaintiff was promoted to Atlanta Sales Manager, and in 1968 to Atlantic Regional Manager.

15. Subsequently, plaintiff was reduced to District Manager upon a reorganization of the Miehle Division's sales and marketing staff. In 1973 or 1974, plaintiff was reduced to a salesman position when Tom Williams was transferred to Atlanta as Miehle's District Manager.

16. Plaintiff does not challenge his transfer from Regional Manager to District Manager or his transfer from District Manager to Salesman.

17. Regardless of plaintiff's job title, at all times during his employment with MGD, he retained specific sales responsibility from accounts within the area to which he was assigned.

18. As a salesman, plaintiff was periodically evaluated as to his performance.

The June 23, 1971, appraisal of plaintiff by Henry O. Chapman, Jr., plaintiff's Regional Manager, explains that "win, lose or draw, he only has one speed." The appraisal also explains that "he [plaintiff] has a definite tendency to view only a small part of the picture and to devote all of his energies to one project with the resulting neglect to other important happenings in his territory."

19. The June 1972 appraisal of plaintiff by Mr. Chapman graded plaintiff as "acceptable" in the categories of flexibility ("the ability to develop or utilize new approaches and new techniques") and relationships with others ("ability to maintain effective working relationships with other people inside and outside the company").

20. In the appraisal, "acceptable" is defined as "less than satisfactory performance for the fact or factors measured. Improvement is necessary and expected when

performance is indicated at this level. Acceptable in this case means that this performance is only temporarily acceptable."

21. Mr. J. P. Cronin, plaintiff's only witness other than himself, testified that he reviewed the annual appraisals of plaintiff, including the 1971 and 1972 appraisals, and that he agreed with the appraisals. He further agreed with Mr. Chapman's recommendation that plaintiff not be given a raise in 1971.

22. In 1973 Mr. Chapman again expressed his concern over plaintiff's tendency to ignore certain accounts and to be more concerned with "meaningless reports and trivia than he is with field sales or field sales supervision." Mr. Chapman again did not recommend a raise for plaintiff and Mr. Cronin agreed.

23. Plaintiff was given merit increases in 1972 and 1974.

24. As a salesman for Miehle, plaintiff was annually assigned a point quota for the

year. This quota was based upon historical sales within the salesman's territory and was used in evaluating the salesman's performance. During 1974, the last full year of plaintiff's employment with MGD, the records of Miehle reveal the following comparison between plaintiff and other Miehle salesmen with regard to realizing the point quota:

First Half 1974

Salesmen's Average Point Quota for 1974	212.64
Average Points Earned 1st half of 1974	90.4
Salesmen's Average % of Quota Met 1st half of 1974	43%
Plaintiff's Point Quota for 1974	230
Plaintiff's Points Earned 1st half of 1974	45
% of Quota met by Plaintiff 1st half of 1974	19%

Second Half 1974

Average Quota in 2nd half of 1974	123.42
Average Points Earned in 2nd half of 1974	125.36

Salesmen's Average % of Quota Met 2nd half of 1974	100.015%
Plaintiff's Quota 2nd half of 1974	157
Plaintiff's Points Earned 2nd half of 1974	35.0
% of Quota met by Plaintiff 2nd half of 1974	22%

25. In 1975 plaintiff sold no Miehle 60-inch presses.

26. In late 1974 and early 1975, MGD conducted a study of the operations of the Miehle Division. As a result of this study, it was determined that the Miehle Division's sales and marketing operations, of which plaintiff was a part, were unprofitable. As a result of this determination, the Miehle Division was instructed to reduce its sales force by 13 employees. The 13 salesmen who were laid off between February and April of 1975, and their ages, are shown below:

W. Carroll	36
A. Hansel	57
K. Kannwischer	26
J. Kloepfer	27
T. Kusek	36
W. Luehwesmann	54
R. Phelps	38
J. Thomas	32
A. Bennett	44

J. Essary	29
C. Garfinkel	52
J. Lockhart	50
R. Pedro	32

27. In approximately March 1975, MGD determined that the remaining members of the Miehle Division's sales force should be divided into two separate and distinct groups. One group (hereinafter "large press group") would have responsibility for marketing the large 43/60 Miehle press manufactured by Miehle. The second group (hereinafter "distributor products group") would have responsibility for marketing the imported presses and related equipment which Miehle distributed on behalf of foreign manufacturers.

28. At the time the decision was made to divide the sales force at MGD into the two separate groups described above, the decision had been made to wind down and eventually cease distribution of the small imported presses and related equipment. No decision had been made with regard to MGD's future involvement in the manufacture

or sale of the large 43.60 Miehle press.

29. Because the 43.60 press was manufactured as well as marketed by Miehle and therefore involved the operation of an 800-employee manufacturing facility, any decision with regard to the manufacture and marketing of this press was more complex than the decision to cease marketing the imported presses and equipment.

30. Mr. J. P. Cronin, former National Sales Manager of Miehle, was placed in charge of the large press group and was allowed to select the salesmen that he wanted to work in his group. Mr. Ed Lemanski was placed in charge of the distributor products group.

31. Plaintiff's experience as a folding carton specialist had given him substantial exposure to the 43-60 Miehle press which the large press group was to market, and plaintiff was one of seven individuals asked by Mr. Cronin to work with him in the large press group. Plaintiff agreed to join the large press group.

32. At least two persons sought by Mr. Cronin for the large press group declined. Mr. Chapman, Eastern Regional Manager of the Miehle sales organization, declined because he thought the newly formed group was doomed to fail, and he advised his Atlanta Regional Manager, Tom Williams, not to join the group.

33. Mr. Williams initially met with the large press group in Chicago under the direction of Mr. J. P. Cronin, but finally declined to join the group.

34. The age of Mr. Chapman was 46, and Mr. Williams was 30 when the large press group was formed.

35. Despite Mr. Chapman's personal opinion regarding future success of the large press group, there is no evidence to suggest that at the time plaintiff joined the group defendant's management had concluded that the group was destined to failure.

36. The large press group failed to sell a single 43-60 press during 1975.

37. During the summer of 1975, due to the failure of the large press group to successfully market the 43-60 Miehle press, MGD decided to cease manufacturing this press and to dissolve the large press group which had been established to market the press.

38. The large press group was in fact dissolved in or about August 1975.

39. Plaintiff was informed in July 1975 of the impending dissolution of the large press group by Mr. J. P. Cronin. Mr. Cronin also advised plaintiff that plaintiff would be laid off at the time the large press group was dissolved.

40. Plaintiff was laid off on August 31, 1975, and drew severance pay equal to his salary while he was retired effective May 14, 1976.

41. At the time of his retirement, the plaintiff was 59 years of age.

42. After August 1975, the distributor products group sold all of the sheet-fed

printing equipment which was marketed by MGD, including a large Roland press which was imported from Germany to substitute for the domestically manufactured press.

43. Plaintiff's sales territory was taken over by Tom Williams, age 30, of the distributor products group. Williams had been assigned to the Atlanta office as Regional Manager and was the person to whom plaintiff reported before plaintiff joined the large press group.

44. At the time of his layoff, plaintiff was not considered for any other position with MGD. There was no opening at that time in the distributor products group except for on in Chicago. That job was filled by a former member of the large press group who was already assigned to Miehle's Chicago office.

45. As a result of changes in the market and improved terms negotiated with Miehle's foreign suppliers, the distributor products group was not dissolved and remains an active part of MGD's business. Plaintiff, however,

has never applied for a position with this group and has never been considered for any other position with MGD or Rockwell since his retirement.

46. Eighteen employees have been added to the staff of sales persons since plaintiff's retirement, one employee, Ed Hughes, age 45, being added as soon as January 1976, after plaintiff's termination but before formal severance on May 13, 1976.

47. Following the notification to plaintiff that his position was being eliminated and that he would, accordingly, be laid off, plaintiff requested that the United States Department of Labor investigate the facts surrounding his layoff.

48. The United States Department of Labor conducted an investigation of plaintiff's claim of age discrimination. On February 17, 1976, the Department informed plaintiff that, upon examination of available data, it had concluded that age was not a factor in the decision of MGD to lay off plaintiff.

49. Following his retirement in 1976, plaintiff was hired by E. L. White Co.

50. From 1976-1978, plaintiff's salary from E. L. White & Co. was $22,016.24.

51. Since June 1, 1976, plaintiff has received the full benefits owed and payable to him under the terms of the Rockwell Retirement Income Plan for Certain Salaried Employees and the amounts due and owing to him under the Miehle-Goss-Dexter Salaried Employees' Profit Sharing Plan. Plaintiff also received the full benefits owed and payable under the Rockwell Savings Plan. He had the option of not drawing his retirement benefits until at least age 65; he elected to accept his retirement benefits rather than defer them.

52. Plaintiff received the maximum unemployment compensation benefits payable, $90 a week for 39 weeks, see Ga. Code Ann. §§54-604, 54-608.1, or a total of $3510.

53. Since his retirement, plaintiff has been receiving $522 a month from the MGD Salaried Employees Profit Sharing Plan.

54. Since his retirement, and based on his less than three years of service with Rockwell, plaintiff has been receiving $99 a month, which was recently raised to $103 a month, from the Rockwell Retirement Income Plan. Plaintiff would have received $125 a month, which has also been increased, from this Plan if he had not elected a surviving spouse benefit option.

55. At his retirement plaintiff received stock worth $2800 and cash in the amount of $3200 from the Rockwell Savings Plan.

56. Plaintiff had come within the coverage of the Rockwell Retirement and Savings Plans in October 1973, after MGD had retained an actuarial firm to conduct a detailed study of the comparative benefits which employees would receive under the Miehle-Goss-Dexter Salaried Employees' Profit Sharing Plan and Rockwell's Retirement Income Plan for Certain Salaried Employees and Rockwell's Savings Plan.

57. The study described above concluded

that the benefits to age 65 retirees under the Rockwell plans exceeded the benefits under the Miehle-Goss-Dexter Salaried Employees' Profit Sharing Plan.

58. Also, in 1973, the Board of Directors of MGD, after reviewing the study discussed above, voted to request that Rockwell International Corporation allow the eligible employees of MGD to be covered by the Rockwell Retirement Income Plan for Certain Salaried Employees and the Rockwell Savings Plan.

59. In October 1973, permission for eligible employees of MGD to become participants in the various Rockwell plans was granted by the Board of Directors of Rockwell International Corporation.

60. As a result of the extension of coverage of the Rockwell Retirement Income Plan for Certain Salaried Employees to qualifying employees of MGD, in October 1973, the Miehle-Goss-Dexter Salaried Employees' Profit Sharing Plan was frozen

in terms of both contributions and benefits payable to these qualifying employees, including plaintiff.

61. Plaintiff and other employees participating in the Miehle-Goss-Dexter Salaried Employee' Profit Sharing Plan could be laid off or terminated at any time.

62. Plaintiff and other employees participating in the Rockwell Retirement Income Plan for Certain Salaried Employees could be laid off or terminated at any time.

63. For a number of years prior to the restating of the provision authorizing early retirement at the Company's election, Rockwell had followed the practice of retiring, rather than terminating, employees over the age of 55 whose positions were being eliminated as a result of closing a plant or other reduction in personnel.

64. This practice of Rockwell had worked to the benefit of the employees so retired because, as retired employees, they were allowed to retain certain insurance

benefits and draw retirement benefits, both of which would have been unavailable if these employees had been terminated.

65. An employee who was involuntarily retired under either the Rockwell or MGD Plan was not required to begin receiving his retirements benefits immeditely and could delay receipt of those benefits until age 65.

66. The average age of salesmen in the Miehle Divsion of MGD has not decreased since the extension of the Rockwell Plan to MGD employees in October 1973. In October 1973, the average age of Miehle salesmen was 40.2 years. At the time plaintiff was laid off in August 1975, the average age of Miehle salesmen was 41.6 years. As of June 30, 1977, the average age of Miehle salesmen was 40.3 years.

67. The decision of MGD to lay off and subsequently retire plaintiff was based upon "reasonable factors other than age" and plaintiff's age was not a determining factor in this decision.

68. Plaintiff was retired pursuant to the provisions of bona fide employee benefit plans which were not adopted as a subterfuge to evade the purposes of the Age Discrimination in Employment Act.

CONCLUSIONS OF LAW

1. The decision to eliminate plaintiff's position and, accordingly, to lay off and subsequently retire plaintiff, was based upon economic considerations which constituted reasonable factors other than age. 29 U.S.C. §623(f)(1). After plaintiff's position with MGD was eliminated as a result of the decision, there was no obligation upon MGD to find another position for plaintiff. As stated in Donnelly v. Exxon Research & Engineering Corp., 12 F.E.P. Cases 417 (D.N.J. 1974):

> The test is not whether [the employer] could have found some other work for him at a reduced salary and thus maintained him in some other capacity on the corporate payroll. The test, at least as this Court views it, is whether he was removed from his then capacity for any improper reason.

12 F.E.P. Cases at 422. See also Usery v. General Electric Co., 13 F.E.P. Cases at 1641, 1657 (M.D. Tenn. 1976). Since there was no such obligation on the part of MGD or Rockwell International Corporation to find a job for plaintiff, and since plaintiff's position with the company was abolished as a result of a reorganization, plaintiff cannot sustain a claim of age discrimination.

2. Plaintiff did not apply for, and was not considered for any position with MGD or Rockwell after his layoff and retirement. MGD and Rockwell were not obligated to consider plaintiff for such positions, but were only obligated to make a nondiscriminatory choice among those applicants who were actually considered. In Furnco Construction Co. v. Waters, 57 L.Ed.2d 457 (1978), the Supreme Court explained:

> The Court of Appeals, as we read its opinion, thought Furnco's hiring procedures not only must be reasonably

proof of such contractual entitlement, the fact that plaintiff was not rehired is of no significance whatsoever in evaluating plaintiff's claim that his layoff violated the Age Discrimination in Employment Act. See Woodburn v. LTV Aerospace Corp., 531 F.2d 780 (5th Cir. 1976); Hiscott v. General Electric Co., 521 F.2d 632, 635 (6th Cir. 1975); Brohl v. Singer Co., 407 F. Supp. 936 (M.D. Fla. 1976).

The average age of employees hired by defendants since plaintiff's termination is of little consequence. As the Fifth Circuit has held:

> Because the aging process causes employees constantly to exit the labor market while younger ones enter, simply the replacement of an older employee by a younger worker does not raise the same inference of improper motive that attends replacement of a black by a white person in a Title VII case. Laugeson v. Anaconda Co., 510 F.2d 307 312-13, n.4 (6th Cir. 1975).

Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, (5th Cir. 1977).

> related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider the qualifications of the largest number of minority applicants. We think the imposition of that second requirement simply finds no support either in the nature of the prima facie case or the purpose of Title VII...
>
> [I]t is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. To prove that, he need not prove that he pursued the course which would both enable his to achieve his own business goal and allow him to consider the most employment applications. Title VII forbids him from having as a goal a work force selected by any prescribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.

57 L.Ed.2d 967-68 (emphasis in original). Moreover, there is no claim that plaintiff was contractually entitled to be rehired after his layoff and retirement. Without

4. The United States Department of Labor investigated plaintiff's allegations of age discrimination and concluded that they were unfounded. This conclusion is admissible in evidence and entitled to weight in determining whether age was a determining factor in plaintiff's layoff and retirement. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Nashville Gas Co. v. Satty, 434 U.S. 136, 142-3 n.4 (1977); Smith v. Universal Services, Inc., 454 F.2d 154, 157 (5th Cir. 1972); Bailey v. American Tobacco Co., 11 F.E.P. Cases 645 (W.D. Ky. 1975).

5. The Rockwell Retirement Income Plan for Certain Salaried Employees constitutes a bona fide employee benefit plan which was not adopted as a subterfuge to evade the purposes of the Age Discrimination in Employment Act. Plaintiff's retirement pursuant to the provisions of this bona fide employee benefit plan is specifically exempted from the Age Discrimination in Employment Act. 29 U.S.C. §623(f)(2)

(prior to 1978 amendment); United Airlines v. McMann, 434 U.S. 192 (1977).

6. At the time plaintiff was retired, section 4(f)(2) of the Age Act, 29 U.S.C. §623(f)(2), entitled an employer to involuntarily retire workers before the age of 65 pursuant to a bona fide retirement plan that was not a subterfuge to evade the purposes of the Act. United States v. McMann, 434 U.S. 192 (1977). Plaintiff has contended that the Rockwell Plan is not bona fide because Rockwell unilaterally reduced the age at which MGD employees could be retired from 60 to 55 and did this for the purpose of involuntarily retiring employees over the age of 55.

The preponderance of the evidence suggests that the concept of early retirement developed at the insistence of employees, rather than involuntary. The evidence also shows that Rockwell lowered the early retirement age for MGD employees at MGD's request.

The evidence also shows that plaintiff was laid off and then retired for a sound business reason. Accordingly, if he had elected not to accept retirement, which was his option, he could have been terminated, even if the early retirement date for MGD employees had not been changed.

Therefore, there is no evidence to suggest that the early retirement provisions of the Rockwell or MGD Plans were used as a subterfuge to evade the purposes of the Age Act or to discriminate against plaintiff or any other employee.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, the Court finds that the defendant is not liable to the plaintiff for violation of the Age Discrimination in Employment Act of 1967, supra, or the Fair Labor Standards Act of 1938, supra. Accordingly, the plaintiff shall take nothing from the defendant

as the result of this action. Let judgment enter in favor of the defendant.

SO ORDERED, this 21 day of June, 1979.

(s) Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division

1100 Citizens Trust Bldg., 75 Piedmont Avenue, N.E., Atlanta, Georgia 30303
Telephone: 526-6396

DATE: February 17, 1976
REPLY TO ATTN OF Area Director

SUBJECT Compliance Federal Labor Statutes

Mr. William H. Hammett, Jr.
6925 Heathfield Drive, N.W.
Atlanta, Georgia 30328

Dear Mr. Hammett:

Recently you gave us information concerning MGD Graphic Systems, 3100 South Central Avenue, Chicago, Illinois. This letter is to inform you of the results of our investigation efforts under the Age Discrimination in Employment Act.

As I discussed with you in your visit to my office on November 24, 1975, your complaint would be forwarded to our Chicago-South Office to be investigated. Area Director Daniel P. New acknowledged receipt of your complaint by letter of December 2, 1975.

The investigation has been completed. Upon examination of available data, it has been concluded that age was not a factor in your termination by MGD Graphic Systems, Division of International Rockwell.

The Department of Labor can take no further action with respect to this matter. This does not affect your individual rights, as explained on page 2 of the enclosed pamphlet.

As you will note, there are certain requirements with specific time periods governing the circumstances under which an individual can file his own suit under this Act. We do not, of course, encourage or discourage such suits. The decision is entirely up to you.

(s)
Alfred Mitchell
Area Director

AM:njg

Enclosure: Pamhlet